

## PRINCIPLED DECISIONS\*

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*This Article develops the theme that judicial decisions, particularly those in extremely difficult cases, are governed by decisional standards derived from jurisprudence. The difficult cases that demonstrate this decisional approach are those that present legal issues of extraordinary complexity and sensitivity because they arise from recurrent and insoluble social dilemmas. In these cases, courts confront a "decisional imperative" that requires them to find sources of legal authority beyond accepted rules of law and recognized legal principles. Courts must find authority in public policy and even social values and morality. This process indirectly shows that courts do not decide these cases for reasons extrinsic to the case itself. Rather, decisional reasons are derived from an analysis and assessment of controlling legal authority that mirrors tenets of legal theory and jurisprudence. At the same time, these cases demonstrate that the court, in rendering a decision based on policy, is addressing a subject that is primarily legislative, that such policy decision constitutes an important part of the interactive dynamic between the judiciary and the legislature, and that although a policy decision cannot solve the social dilemmas that trigger the legal issues of the case, it can clarify those dilemmas and advance their ultimate solutions.*

### I. INTRODUCTION

Some thirteen years ago, I had the opportunity to deliver the Chief Justice Joseph Weintraub Lecture. I called that lecture: "Social Dilemmas, Judicial (Ir)resolutions."<sup>1</sup> Its theme, simply put, was that courts take on cases posing problems they cannot possibly solve. We are thus presented with the irony of courts determining cases, but not solving their underlying issues. The unanswerable problems embedded in the sharp and intense legal controversies posed by such

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\* This Article is based on the Chief Justice Joseph Weintraub Lecture, which I delivered on March 14, 2000, and called "Principled Decisions: A Retrospective and Prospective of the New Jersey Supreme Court." The origin of this Article as a speech explains why it is somewhat colloquial.

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1. Alan B. Handler, *Social Dilemmas, Judicial (Ir)resolutions*, 40 RUTGERS L. REV. 1 (1987) [hereinafter *Social Dilemmas*].

cases stem from underlying social dilemmas. Because those controversies arise from recurrent and intractable social dilemmas, the legal questions they pose are fundamentally unanswerable, at least by judges.

That theme was illustrated, if not illuminated, by a discussion of litigation that turned on such a deeply-troublesome social issue, the so-called right-to-die cases.<sup>2</sup> Those cases posed, in both individual and institutional settings, life-and-death dilemmas. Those dilemmas were experienced not only by the hopeless persons on whose behalf judicial relief was sought, but were experienced and shared throughout society.<sup>3</sup> The dilemma underlying the issues of those cases, garbed as legal controversy, was whether an incompetent patient suffering from incurable and terminal illness could call upon physicians and health care providers to withhold medical treatment to hasten death.<sup>4</sup> That issue called for the application of statutory and common-law principles and standards of professional ethics, as well as the reconciliation of competing moral values—those touching on personal autonomy and privacy and individual dignity and worth, ranged against the ethical and legal responsibilities of professional health care providers and life-savers.<sup>5</sup>

Such cases left one wondering: what is a court to do? Cases presenting profound dilemmas involving both the importunate concerns of individuals and the collective interests of society are always with us. The legal issues they pose are of the most stubborn and difficult sort, issues that reflect the indelible dilemmas that beset people and society; and they are seemingly unsolvable because no answer, however wise and balanced, yields an ideal, stable or definitive result. Yet, these cases and their issues inevitably find their way to court. And, like any case in court, they must be determined, even though, in that effort, courts must stretch the fabric of the law to a breaking point.

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2. See, e.g., *In re Conroy*, 486 A.2d 1209 (N.J. 1985) (discussing the circumstances wherein life-sustaining treatment may be withdrawn or withheld from institutionalized elderly patients who have limited life expectancy as well as severe and permanent physical and mental impairments); *In re Quinlan*, 355 A.2d 647 (N.J. 1976) (recognizing a privacy right of a moribund incompetent person to have her life ended with dignity). Other right-to-die cases, then pending and since decided, were also discussed. See, e.g., *In re Jobes*, 529 A.2d 434 (N.J. 1987) (determining the guidelines under which life-preserving treatment is removed for an incompetent terminal patient); *In re Peter*, 529 A.2d 419 (N.J. 1987) (determining the guidelines under which treatment that is life-sustaining is withdrawn); *In re Farrell*, 529 A.2d 404 (N.J. 1987) (defining who can make the decision to withdraw life-sustaining treatment from a terminally-ill patient and how this decision can be reached).

3. See *Social Dilemmas*, *supra* note 1, at 9-10.

4. *Id.* at 13-14.

5. *Id.* at 11-16.

In a way, the lecture that is the basis for this Article returns to that earlier theme. There are, indeed, social dilemmas that the court cannot solve; the judicial determinations of such issues purport to be final, but, in fact, they are not; the court's answers are "irresolute." This may be perplexing and frustrating, but it is not all that bad. The inability of courts to resolve and fully settle the social dilemmas ingrained in these difficult cases should not be considered a failing. Rather, the judicial disposition of a case that is not a definitive or final solution of its fundamental issue may itself be constructive. Such dispositions can clarify and refine the issues embedded in difficult social dilemmas. The court's incomplete and partial responses in these cases can actually be a catalyst in the solution to their underlying problems. The lack of finality and the incompleteness of the court's answers to the complex questions posed by social dilemmas can nevertheless advance their ultimate resolutions. Further, such indeterminate determinations should not be viewed as a complicating factor that perpetuates or exacerbates the underlying dilemmas. The judicial disposition of legal controversies involving social dilemmas can become an institutional goad, a vital part of the dynamic by which policy is forged and by which law, as an expression of public policy and social authority, evolves and progresses.

This theme—that a court's answers addressing difficult issues, though incomplete and partial, are important and incremental steps in resolving underlying social dilemmas—calls for an examination of when a court should render a decision in these very difficult cases. This examination will reveal standards that courts follow to determine such cases. These standards also may be a measure to assess whether courts have rendered sound judicial decisions, that is, decisions that not only justly and fairly determine the legal dispute of individual litigants, but also clarify and refine deeper social issues. Further, standards may demonstrate whether such a decision has the qualities of consistency, cogency and intelligibility, and, as an expression of social authority, conforms to and fulfills, rather than disappoints, reasonable expectations.

This analysis reveals that there are principled standards, extrapolated from judicial decisions, that guide the determinations of cases involving complex and profound social issues. Courts, consciously or not, follow standards in rendering such decisions.

There is another instructive by-product of this analysis. That courts invoke sound decisional guidelines in deciding cases that present important, complex, and controversial social issues should disabuse the notion that courts are arbitrary and subjective in deciding these most difficult cases, or worse, that they are unconstrained or gratuitously proactive. The realization that decisional principles influence judicial determinations should counter the

perception that courts are agenda-driven, that their decisions are based on ideologies or priorities extrinsic to the case itself, and, further, that they needlessly arrogate for the judiciary the governmental authority and responsibility over public policy.

## II. PRINCIPLES OF DECISIONS

The analysis of the structure of the court's decisional process requires some context. The decisional standards that guide judicial decisions in cases presenting complex social dilemmas reflect, or surely can be reconciled with, theories of jurisprudence, which, in turn, suggests a basis for determining that the court's decisional approach is sound and principled. A few major jurisprudential theories of law can provide such a framework and demonstrate that sound decisional principles derived from legal theory are applied by courts, albeit in the intensely pragmatic settings posed by litigated cases. A sampling and summary of such legal thought will set the stage.

Throughout civilized history, law has been understood and accepted as the expression of social authority, which often, if not always, also expresses and reflects an ultimate truth or morality.<sup>6</sup> Law that focused on essential truth or morality has been considered to be divine or derived from universal natural principles.<sup>7</sup> Thus, law so viewed not only embraced society's power and authority, but also expressed its moral values.<sup>8</sup> Under this view, the English common law, as explained by Blackstone, was both the natural law and the law of God.<sup>9</sup>

A contemporary view of the natural law theory is held by John Finnis. He believes that through life experiences we know self-evident basic goods that enable life to flourish.<sup>10</sup> The natural law embraces objective principles derived from these basic goods, which must be applied to achieve a flourishing life; law in this process is formulated by legal authority to achieve the common good under existing conditions and imports a moral obligation of obedience.<sup>11</sup>

The natural law theory, as originally expounded, was countered by the theory of legal positivism, reflecting the influence of the English legal theorist, Jeremy Bentham.<sup>12</sup> Bentham rejected the

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6. See generally Alan B. Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571 (1986) [hereinafter *Jurisprudence*].

7. *Id.* at 574.

8. See *id.*

9. *Id.*

10. John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134, 134-35 (Robert P. George ed., 1992).

11. *Id.* at 136-37.

12. See *Jurisprudence*, *supra* note 6, at 574.

notion that law was either divine or natural.<sup>13</sup> The legal positivist theory perceives a separation between legal and moral principles.<sup>14</sup> The positivist theory of law is founded on the belief that law expresses the majoritarian will or view, and it is positive only as it is expressed; law, therefore, has, beyond its expression, no intrinsic moral or ethical content.<sup>15</sup>

H.L.A. Hart was the foremost exponent of contemporary legal positivism.<sup>16</sup> He expressed the view that law constitutes social authority, and that social authority must be expressed through clear legal rules.<sup>17</sup> Clear legal rules are founded on the common understanding or social consensus, which is epitomized as a "rule of recognition."<sup>18</sup> Decisions that are not based on clear legal rules and not validated by an underlying rule of recognition, according to Hart, are not really law, but instead constitute only the exercise of judicial discretion.<sup>19</sup> Such decisions are not governed by precedent, but are essentially influenced by extralegal factors, such as considerations of public policy, social values, and moral concerns.<sup>20</sup>

Joseph Raz adheres to the theory of legal positivism in the sense that there is no necessary connection between law and morality.<sup>21</sup> He stresses, however, the "social thesis," that is, "social fact" determines what is law, and also, the "source thesis," which identifies the existence and context of law from objective facts of human behavior, apart from moral precepts.<sup>22</sup>

Legal positivism provoked a reaction—legal realism. Karl Llewellyn, for example, contended at one time that it was illusory to believe that rules decided cases.<sup>23</sup> Jerome Frank believed that the law is simply a particular case decision, a perception that views judges as policy makers.<sup>24</sup>

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 575.

17. *Id.* The primary elements of Hart's philosophy can be found in H.L.A. HART, *THE CONCEPT OF LAW* (1961).

18. *Jurisprudence*, *supra* note 6, at 575.

19. *Id.*

20. *Id.* Moral rules, according to Hart, have a role. Although moral rules differ from legal rules, they, nevertheless, may command adherence because of their significance, their immutability, their influence and their appeal to conscience. *Id.* at 575-76 (referring to H.L.A. HART, *THE CONCEPT OF LAW* (1961)).

21. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 39 (1979).

22. *Id.* at 40-45.

23. *Jurisprudence*, *supra* note 6, at 575 (citing KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 3-41 (1962)).

24. *Id.* (citing JEROME FRANK, *LAW AND THE MODERN MIND* 50-51 (Anchor Books

Professor Ronald Dworkin holds a different view. Judges, according to Dworkin, have a duty to decide cases, if at all possible, by discovering rights derived primarily from rules of law, which are established and accepted legal authority.<sup>25</sup> Law, however, is that which is determined not only by clear and uncontradicted rules, but also by principles.<sup>26</sup> Principles, like rules of law, are widely recognized, but they may be ambiguous and uncertain, and, they are usually controversial.<sup>27</sup> Principles can also have some moral content, and hence, they can be applied without being dispositive for all legal questions.<sup>28</sup> Nevertheless, principles that determine rights can become a part of the law and be considered binding or authoritative if there exists a clear basis for their application and there is gradual, general acceptance of them as a basis for determining rights.<sup>29</sup>

A case that must be decided by principles, in Dworkin's view, implicates judicial discretion. Such a case is characterized as a "hard case." A hard case is one that cannot be determined by settled law, it entails choosing among competing principles and assigning weight and importance to principles in the process of finding the correct grounds for decision.<sup>30</sup> Thus, in Dworkin's understanding, law can incorporate principles, which may have policy and moral value, but do not acquire their legitimacy by conforming to or satisfying any positivist "rule of recognition." Further, decisional standards should be prioritized.<sup>31</sup> Because the decision of a case creates legal obligations, such a decision based on principles, as one based on established law, should not radically alter reasonable expectations.<sup>32</sup> Courts must therefore apply principles with "articulate consistency," that is, with reference to existing rules and established legal authority.<sup>33</sup>

Beyond principles, policy considerations also play an important role in judicial decision making. According to Dworkin, a policy decision, in contrast to a decision based on rules or principles, is one that seeks primarily to advance or protect a collective goal of the community as a whole.<sup>34</sup> Law that is based on policy, unlike law

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ed. 1963)).

25. *Id.* at 576.

26. *Id.*

27. *Id.*

28. *Id.* at 576-77.

29. *Id.*

30. *Id.* at 576 (noting that Dworkin posited as the prototypical "hard case," *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

31. *Jurisprudence*, *supra* note 6, at 577.

32. *Id.* at 576.

33. *Id.*

34. *Id.* at 577.

based on rules and principles, is, in effect, legislative in character and discretionary, and, therefore, a decision based on policy obviates "articulate consistency" as a decisional objective.<sup>35</sup> A policy decision does not depend on any other accepted, established or settled basis for assigning more weight to one policy over another.<sup>36</sup>

Professor Lon Fuller expressed the view that law embraces moral values, that law is not content neutral, but is "purposive."<sup>37</sup> Although law is inherently value laden, law is a dynamic process that attempts to subject human conduct to rules and, should, therefore, reflect an "internal consistency," that moral rules are intrinsically "right."<sup>38</sup> The legal system can provide public rules that serve as a basis for legitimate expectations upon which people can orient their behavior.<sup>39</sup> Fuller acknowledges that, as a dynamic process, law is not always successful, because law is not simply the expression of social authority, but is a complex of what is *and* what ought to be.<sup>40</sup>

There are other scholars who have espoused a holistic conceptualization of the law. For example, Kent Greenawalt, like Dworkin, accepts the distinction between principles and policy, and believes that judges must rely on principles in deciding certain cases.<sup>41</sup> He does not, however, share Dworkin's understanding of judicial discretion, which always leads to the presumed correct result.<sup>42</sup> Thus, when legal authority leaves an issue genuinely in doubt, judges properly rely on firm convictions of moral rightness and social welfare that are broadly accepted and command wide support.<sup>43</sup>

Edgar Bodenheimer would recognize that rules and principles are a part of the law, but acknowledges that informal sources of law,

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35. *Id.*

36. It has been observed that there are conceptual similarities between Dworkin's beliefs and positivism. Because Dworkin claims that law is based only on rules and principles but acknowledges that certain principles can be legally valid, some scholars maintain that any test that establishes the validity of principles is really a disguise for Hart's "rule of recognition." *Id.*

37. *Id.* at 577-78.

38. *Id.* at 578.

39. *Id.*

40. *Id.* Fuller believed that law must accommodate what "ought to be" and reflect "the sense of being 'right'." According to Fuller, law had distinctive moral aspects, namely "generality, publication, prospectivity, intelligibility, consistency, adjustment to human capacity, stability, and congruity." *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 579. Discretion, Greenawalt observes, could be said to exist "so long as no practical procedure exists for determining if a result is correct;" that may be determined if "informed lawyers disagree about the proper result," and if "a judge's decision either way will not widely be considered a failure to perform his judicial responsibilities." *Id.* at 578-79 (quoting Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 386 (1975)).

such as public policy, common conviction, and moral considerations may be incorporated into the legal order.<sup>44</sup>

Stephen Munzer acknowledged Dworkin's precept of "articulate consistency" as a decisional factor, but believed that construct did not address those cases in which the right answer cannot be discovered.<sup>45</sup> Drawing on the literary analogy of "narrative consistency," he notes that principles of decision may not "yield uniquely correct results," and that a decision, like a work of literature, may purposely be left in an ambiguous state.<sup>46</sup> Munzer believes that "just as authors may write novels that intentionally leave some questions insusceptible of definite resolution, so may judges—and of course legislators—leave the exact bearing of a legal determination open with respect to certain issues."<sup>47</sup> This process, referred to as "conscious indeterminacy," defers the resolution of the "most difficult issues until those issues can be more precisely formulated and the consequences better ascertained."<sup>48</sup>

Joseph Singer also entertains an open-ended view of the law. He "stresses the inevitability of contradictions which arise whenever a judge must determine the applicable legal rule."<sup>49</sup> He acknowledges that there is no real objectivity to the resolution of contradictions in particular cases; rather, what is done, reminiscent of Oliver Wendell Holmes, is to preserve "the illusion of certainty."<sup>50</sup> Because "legal decisions must grapple with fundamental contradictions, courts have no alternative but to decide cases in light of competing goals and interests on a case-by-case basis. The antidote to this is the conscientious weighing of competing considerations and persuasive explanations of the reasoning process and the result reached."<sup>51</sup>

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44. *Id.* at 579. Bodenheimer acknowledged that judicial decisions must adapt innovation to accepted traditions, opinions, or preferred societal values. He expressed the view that a new right is determined when arguments in its favor are of "decisive superiority," even though the right is controversial. A moral canon can become a legal duty when a mode of behavior is conceived "to be a well-nigh indispensable, rather than a merely desirable" aspect of human conduct. *Id.* (quoting Edgar Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143, 1169 (1977)).

45. *Id.*

46. *Id.* at 579-80 (quoting Stephen Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055, 1057 (1977)).

47. *Id.* at 580.

48. *Id.* Munzer noted that even Dworkin has come to recognize a class of hard cases—perhaps to be called the "hardest cases"—that will not have uniquely correct results. *Id.*

49. *Id.*

50. *Id.* (quoting Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058-59 (1984)).

51. *Id.* at 580-81. Singer acknowledged that the choices made by courts can be "rational" even though not based on clear or precise logic, and that, as a result, the



From this brief array of legal theory, we may conclude that there are cases that demand a search for decisional sources beyond firm authority, sources that extend beyond established legal rules and recognized principles. Although some thinkers believe that this threshold marking the limits of settled and acceptable authority, if it exists at all, may be crossed quickly and easily, there is much to be said in support of the view that because law expresses social authority and commands obedience, it must accommodate reasonable expectations and, to that end, law must achieve a fair degree of consistency, stability and predictability, even as it must reach a correct and just result in a given case. Hence, the need to go beyond precedent and solid authority and find other sound grounds for deciding cases must be great—the case must truly be a “hard case,” one whose just and correct result cannot be found in settled authority. The need to initiate such a judicial search for extended grounds of authority may be viewed as a “decisional imperative.”

Many cases trigger this “decisional imperative.” Although one may agree with Dworkin that courts must refrain from deciding cases based on policy, “hard cases” leave the court with no alternative; it may not be possible or even desirable in certain cases to avoid considerations of public policy. That need is most acute in cases that squarely present public policy issues—issues that are raised by individual parties, but directly implicate collective societal concerns. The decisions in those cases must advance beyond established legal rules and recognized principles of law. Because those other extended grounds for decisions consist of policy, and beyond policy, social values and morality, they are inherently legislative in character; they will necessarily and inevitably move the law into areas that, concededly, are reposed in other branches of government. Hence, a corollary of judicial determinations that are based on policy triggered by a “decisional imperative” is that they are invariably subject to second-guessing. In other words, such decisions necessarily lack finality.

Because such cases address the broader concerns of public policy, they raise the question: to what degree may or should a court attempt to resolve those cases and invest their decisions with certainty in order to give their determinations, if not finality, at least stability. It follows from this analysis, however, that with many, if not most, of these cases, it is not possible for the court to do so; their policy decisions are, by definition, discretionary and “legislative” in character; and, other institutions, not the judiciary, have the ultimate responsibility for expressing the “last word” in settling policy. Whether, then, the court’s decision in policy cases confers certainty and finality or reflects only the “illusion of certainty” (according to

Singer), or only "conscious indeterminacy" (as expressed by Munzer), is a theoretical or philosophical question that need not be answered. Still, regardless of the perception and reception of judicial decisions as definitive expressions of social authority, a court should confront social dilemmas head-on when they are squarely and inescapably presented in the cases to be decided; a court should render a decision that will settle the matter before it; and a court should, in rendering its decision, fully address the social dilemmas underlying the legal issues, and, in that process, clarify those dilemmas and advance their ultimate solutions.

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Decisions of the New Jersey Supreme Court exemplify this process.<sup>52</sup> Examples reveal a principled approach in rendering decisions in very controversial and difficult cases. Its decisional approach reflects the application of standards or guidelines that result in: "Principled Decisions." They illustrate the ways in which courts deal with persistent and recurrent societal concerns that implicate public policy, and how the law deals with those concerns in given cases and, further, in this process, how the law evolves in the face of changing circumstances.

### III. INVOKING SOCIAL POLICY

The notion that decisional law is anchored to established and accepted authority is one acknowledged not only by certain legal philosophers and scholars. That view, indeed, has long been recognized by courts. It is, in fact, a fundamental premise of the common law. The common law seeks a balance between firmness and flexibility, consistency and change. This character of the common law was expounded by Chief Justice Vanderbilt in *State v. Culver*,<sup>53</sup> when he stated:

One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.<sup>54</sup>

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52. See discussion *infra* Part III.

53. 129 A.2d 715 (N.J. 1957).

54. *Id.* at 721.

The Chief Justice further observed:

Dean Pound posed the problem admirably in his *Interpretations of Legal History* (1922) when he stated, "Law must be stable, and yet it cannot stand still."

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The factors to be weighed in the balance in determining the present course of the law include the reasons for the rule, the present requirements of the environment in which the rule is to be applied, the dangers incident to any change and the evils resulting from its continuance. The power of growth is inherent in the common law.<sup>55</sup>

Opinions of the New Jersey Supreme Court covering virtually all subjects of the law reveal decisional standards based on gradations and levels of legal authority. That wide spectrum is fully consistent with the notion that society's dilemmas give rise to myriad controversies that cover the entire legal landscape. Turning to the law of torts, for example, we can find at the core of this body of law certain fundamental rules and principles that anchor this law, yet, courts through the adaptations and continuing applications of these basic tenets in changing circumstances have recognized that decisional grounds must be extended to reach a just result in a given case.

Two cases exemplify these core elements of tort jurisprudence. In 1962, the court, in *Goldberg v. Housing Authority of Newark*,<sup>56</sup> explained the basic standard for determining when a duty of care should be recognized. Chief Justice Weintraub said:

The question is not simply whether a [risk of injury] is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.<sup>57</sup>

A few years later, in *Caputzel v. Lindsay Co.*,<sup>58</sup> the court dealt with the other pillar of tort law, proximate cause. Like the duty of care, proximate cause also turns on foreseeability, but it uses foreseeability in a different way. The court stated that "[f]oreseeability is not solely a mere matter of logic, since anything is foreseeable, but

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55. *Id.*

56. 186 A.2d 291 (N.J. 1962).

57. *Id.* at 293. Commenting on the policy consideration in applying that standard to determine whether a public housing authority had the duty to provide police protection to prevent crime, the court stated that the duty would not be imposed based solely on "foreseeability" because "[e]veryone can foresee the commission of crime virtually anywhere and at any time," and that to require limitless police protection in all circumstances would not be palatable. *Id.*

58. 222 A.2d 513 (N.J. 1966).

frequently involves questions of policy as well,"<sup>59</sup> and that proximate or legal cause is that combination of "logic, common sense, justice, policy and precedent" that fixes a point in a chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery.<sup>60</sup>

Virtually all tort cases start with the basic principles articulated in *Goldberg* and *Caputzel* in determining the existence of a duty and proximate cause.<sup>61</sup> Their applications in changing circumstances, however, necessarily invoke considerations of public policy that have required these basic rules of law to be extended and reshaped in order to reach a just result. They, therefore, illustrate the process whereby, in hard cases, in which the correct or just result is not obviously at hand through the conventional interpretations and applications of the extant law, there is a decisional imperative to explore and find other grounds for determinations.

In *Kelly v. Guinnell*,<sup>62</sup> the court considered whether a social host should be liable for the automobile death of an innocent person caused by the host's guest who, before driving his automobile, had been served alcohol while visibly intoxicated.<sup>63</sup> The court recognized the dilemma posed by the plight of an innocent victim and the privacy and freedom interests of persons, like social hosts, not directly or immediately involved in the accident itself.<sup>64</sup> The court sensed that there was a need to look beyond a conventional understanding of the legal rules of tort duty to reach a just result.<sup>65</sup> In an opinion written by Chief Justice Wilentz, the court, after relating the circumstances surrounding the obvious intoxication of the guest, observed:

In most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care.<sup>66</sup>

There are other cases that demonstrate the varying contexts in which these fundamental tort principles are applied and the balance

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59. *Id.* at 516.

60. *Id.* at 517 (quoting *Powers v. Standard Oil Co.*, 119 A. 273, 274 (N.J. 1923)).

61. *See, e.g., Caputzel*, 222 A.2d at 516 (explaining and applying the standards for determining proximate cause); *Goldberg*, 186 A.2d at 293 (stating that the question is whether there is a duty to take steps to guard against a criminal event).

62. 476 A.2d 1219 (N.J. 1984).

63. *Id.* at 1220.

64. *Id.* at 1224-25.

65. *See id.* at 1222.

66. *Id.* (citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928)).

struck between stability on the one hand and flexibility on the other. In *People Express Airlines, Inc. v. Consolidated Rail Corp.*,<sup>67</sup> the court considered whether economic damages could be recovered in a tort action arising from a negligent chemical leak.<sup>68</sup> The court wrestled, again, with the precepts of duty and proximate cause.<sup>69</sup> It recognized the accepted rules of law that allowed recovery for economic losses only if the claimant could show "the fortuitous occurrence of physical harm or property damage, however slight."<sup>70</sup> The court concluded that even though conventional understanding would not impel the application of these rules to determine liability, recognition of responsibility in the circumstances was clearly required in order to reach the correct and just result because economic damages were "particularly foreseeable."<sup>71</sup> Accordingly, it reformulated the duty of reasonable care and proximate cause to explain why under the circumstances recovery was proper.<sup>72</sup> Noting the basic standard of foreseeability, the court observed more pointedly that liability may be imposed where, "along a spectrum ranging from the general to the particular, foreseeability is ultimately found."<sup>73</sup> It held:

[A] defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct.<sup>74</sup>

In *Hopkins v. Fox & Lazo Realtors*,<sup>75</sup> in 1993, the court imposed a duty of care on a real estate agent to a potential customer who was injured in the course of touring a home during an "open house."<sup>76</sup> It observed that "the legal rules expressive of the common law embody underlying principles of public policy and perceptions of social values."<sup>77</sup> The court found that existing legal rules, the traditional common law doctrine of property owners' liability, "gauged by the right of [the claimant] to be on the land,"<sup>78</sup> required, under the circumstances, a more resilient approach to "provide reliable guidance in determining the existence and scope of the duty of care that

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67. 495 A.2d 107 (N.J. 1985).

68. *Id.* at 108.

69. *Id.* at 110.

70. *Id.* at 109.

71. *Id.* at 118.

72. *Id.* at 115-16.

73. *Id.* at 115.

74. *Id.* at 116.

75. 625 A.2d 1110 (N.J. 1993).

76. *Id.* at 1112.

77. *Id.* at 1114.

78. *Id.* at 1113.

should be ascribed to a broker."<sup>79</sup> The court imposed a duty of care based on the "substantial" nature of the relationships between a real estate broker and its customers in the conduct of any open-house inspection of property.<sup>80</sup>

The court's approach in *Hopkins* reflects a scheme of priorities in the application of decisional standards. The court initially resorted to established rules of law and recognized principles. It observed that the common law classifications governing landowner liability did not suffice, nor did they "provide reliable guidance" in the determination of responsibility in these circumstances.<sup>81</sup> In effect, the court confronted a decisional imperative to look further for authority.

The court in *Carvalho v. Toll Bros. and Developers*,<sup>82</sup> in 1996, considered whether a duty of care was owed by a project engineer who was required to provide an on-site inspector to supervise the progress of work at a construction site.<sup>83</sup> The decedent, a laborer employed by one of the subcontractors, was killed when a trench collapsed on him.<sup>84</sup> The court concluded that the antecedent rule—that a general contractor is not responsible for the safety of the employees of a subcontractor—could not be fairly applied under the circumstances.<sup>85</sup> Combining and weighing all relevant factors—the foreseeability of the nature and severity of the risk of injury based on the defendant's actual knowledge of dangerous conditions, the relationship of the parties, the obvious connection between safety concerns in general and the defendant's specific responsibility for work progress, and the defendant's ability to take corrective measures to rectify the dangerous conditions—the court concluded that considerations of fairness and sound public policy impelled the recognition of a duty in the engineer to exercise reasonable care to avoid the risk of injury to employees of subcontractors on the construction site.<sup>86</sup>

In the field of products liability, we witness a similar adherence to decisional guides that take the court across a spectrum of authority. In *Perez v. Wyeth Laboratories, Inc.*,<sup>87</sup> the court ruled that the duty to warn on the part of a pharmaceutical manufacturer that engaged in mass, direct-to-consumer advertising was not lessened or overcome by the so-called learned intermediary doctrine—that the

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79. *Id.* at 1115.

80. *Id.* at 1117.

81. *Id.* at 1115.

82. 675 A.2d 209 (N.J. 1996).

83. *Id.* at 211.

84. *Id.* at 212.

85. *Id.* at 215.

86. *Id.* at 214-15.

87. 734 A.2d 1245 (N.J. 1999).

duty to warn a potential consumer of dangers or risks in the use of the advertised drug could not be diminished or excused because it was anticipated that the consumer would seek the advice of her doctor, the learned intermediary.<sup>88</sup> The court took into account the policy considerations arising from contemporary mass advertising practices of medical and health-related products and the influence of such advertising on consumers.<sup>89</sup> The court, in effect, recognized that conventional authority did not adequately address these concerns.<sup>90</sup> The court understood, in determining the nature and extent of the manufacturer's duty to warn, that it was basing its decision on principles, not settled and established legal rules, and that such a choice was still controversial.<sup>91</sup> It observed:

If we decline to resolve the question, we are making the substantive determination that the learned intermediary doctrine applies to the direct marketing of drugs, an issue recently debated but left unanswered by the drafter of the *Restatement*. Either course, then, requires us to adopt a principle of law. The question is which is the better principle.<sup>92</sup>

In terms of fairness, however, the court acknowledged that such manufacturers were subject to federal regulations.<sup>93</sup> It ruled, accordingly, that the pharmaceutical manufacturer was entitled to a rebuttable presumption that it breached no duty if its warnings conformed to FDA requirements.<sup>94</sup> The court stated, "we believe that this standard is fair and balanced. For all practical purposes, absent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive of such claims."<sup>95</sup>

Tort cases involving responsibility for the criminal acts of a third person focus on the essential elements that surround a duty of care, as well as proximate cause, and, particularly, whether the criminal acts of a third person should be deemed to be too remote as a matter of law and public policy.<sup>96</sup> In *Clohesy v. Food Circus Supermarkets, Inc.*,<sup>97</sup> the court found such a duty of care and proximate cause.<sup>98</sup> The

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88. *Id.* at 1263-64.

89. *Id.* at 1261.

90. *See id.*

91. *See id.* at 1264.

92. *Id.* at 1254.

93. *Id.* at 1259.

94. *Id.*

95. *Id.*

96. *See Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1020-22 (N.J. 1997).

97. 694 A.2d 1017 (N.J. 1997).

98. *Id.* at 1019.

court noted that the earlier case, *Butler v. Acme Markets, Inc.*,<sup>99</sup> itself recognized the inadequacy of conventional applications of established law and that it "rejected all public policy and economic reasons for not imposing liability on supermarket owners for injuries caused by foreseeable criminal conduct."<sup>100</sup> The court pointed out that while foreseeability, as such, is not dispositive, it is a crucial element that subsumes many of the relevant concerns—knowledge of the risk, the nature of the risk, the relationship between parties, and the opportunity and ability to exercise care—that demonstrate the fairness and sound policy in recognizing a duty of care.<sup>101</sup>

These tort cases also underscore how close in torts jurisprudence is the conceptual relationship between duty and proximate cause. Both directly implicate considerations of public policy that consistently require the examination and frequently the extension of antecedent rules. Focusing on proximate cause, the court confronted the public policy notions of remoteness and fairness that were implicated in *Vega v. Piedilato*.<sup>102</sup> It considered the claims arising from the tragic death of a young boy who sustained paralyzing and ultimately fatal injuries from an attempt to leap over a roof-top shaft of a high-rise apartment building.<sup>103</sup> The court, in these circumstances, was impressed by the complexities of the relationship between the parties, the circumstances touching on housing conditions, the social interactions affecting persons living in urban multiple dwelling complexes, and the difficulties in sorting out such dilemmas.<sup>104</sup> The court, nevertheless, determined that existing common law rules of landowner responsibility could be applied flexibly to reach a correct and just result, albeit a hard one.<sup>105</sup> It concluded, as a matter of law, that the sole proximate cause—the real cause of the boy's accidental fall—was his own negligence.<sup>106</sup>

Similar recognition of the social dilemmas engendering difficult legal issues in the applications of principles of proximate cause was expressed in the area of governmental tort immunities. In *Fluehr v. City of Cape May*,<sup>107</sup> a surfer who disregarded the onset of a hurricane was paralyzed by the force of the waves throwing him against the ocean bottom.<sup>108</sup> The court carefully considered the underlying social

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99. 445 A.2d 1141 (N.J. 1982).

100. *Clohesy*, 694 A.2d at 1027.

101. *Id.* at 1028.

102. 713 A.2d 442 (N.J. 1998).

103. *Id.* at 444.

104. *Id.* at 448.

105. *See id.*

106. *Id.* at 449.

107. 732 A.2d 1035 (N.J. 1999).

108. *Id.* at 1036.



dilemmas in the context of public policy expressed by the legislature through statutory governmental tort immunity.<sup>109</sup> It concluded, as a matter of law, that "any negligence by the lifeguards did not proximately cause plaintiff's injuries," and, in view of plaintiff's own knowledge and experience, any "negligence of the lifeguards is too remotely or insignificantly related to plaintiff's accident"; the swimmer's own negligence was the sole proximate cause of the accident.<sup>110</sup>

In the field of medical malpractice, in *Canesi ex rel. Canesi v. Wilson*,<sup>111</sup> a wrongful birth case, the court dealt again with the issue of proximate cause and the extent to which the application of settled law and recognized principles could justly and correctly resolve the individual claims and address the fundamental social dilemmas.<sup>112</sup> There, a child was born with a specific congenital defect; the treating physicians had not warned the pregnant plaintiff of the risk of that defect arising from prescribed medicine.<sup>113</sup> The evidence indicated that the medication was not a medical cause of the defect itself. But, the legal issue posed was whether the denial of the mother's choice to terminate the pregnancy was itself lost because of the failure to warn.<sup>114</sup> In finding proximate cause, the court stressed that the circumstance of the similarity between the child's defect and the failure to warn of the risk of that defect obviated proof of medical causation of the defect; circumstantial similarity was relevant not to prove medical causation, but only to prove causation of the denial of choice and the continuation of the pregnancy to term. That similarity served to demonstrate that the birth of a child with a congenital defect was "itself a result that was not too remote in relation to the doctor's failure to apprise the parents of that risk during pregnancy."<sup>115</sup>

A leading case implicating the principle of proximate cause in the area of environmental tort liability is *Ayers v. Township of Jackson*.<sup>116</sup> That case involved the exposure to toxic substances and the acute need to reach a just result in view of the potential dire consequences facing the exposed individuals.<sup>117</sup> The court recognized that the Tort Claims Act barred recovery for the pain and suffering associated with emotional distress.<sup>118</sup> It also acknowledged the

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109. *Id.* at 1038-41.

110. *Id.* at 1041.

111. 730 A.2d 805 (N.J. 1999).

112. *Id.* at 810-13.

113. *Id.* at 809.

114. *Id.*

115. *Id.* at 819.

116. 525 A.2d 287 (N.J. 1987).

117. *See id.* at 291.

118. *Id.* at 295.

complexities of proximate cause in establishing medical causation.<sup>119</sup> It therefore recognized the compensability of claims for the enhanced risk of future illness attributable to the exposure and allowed, as a matter of basic fairness and sound policy, claimants to recover damages for medical surveillance expenses.<sup>120</sup>

In *Rubanick v. Witco Chemical Corp.*,<sup>121</sup> the court was strongly influenced by public policy concerns arising from the difficulty in establishing proximate cause—medical causation—in the context of toxic exposure.<sup>122</sup> It addressed the underlying social dilemmas and acknowledged that it could not with any certainty resolve those dilemmas.<sup>123</sup> The court, responding to an imperative to reach a correct and just result, went beyond existing rules and principles.<sup>124</sup> It fashioned a broader standard for assessing the reliability (as it pertains to admissibility) of expert testimony relating to developing theories of causation in tort litigation involving exposure to toxic substances.<sup>125</sup> The court reasoned that settled and accepted legal rules and principles no longer served as grounds of decision because they were unable to deal sufficiently with the perplexity of medical causation; medical causation could not be proved according to conventional scientific standards.<sup>126</sup> Accordingly, the court relaxed those evidentiary standards defining the kind and quantity of proof required to establish causation.<sup>127</sup> It held:

[I]n toxic-tort litigation, a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field. The evidence of such scientific knowledge must be proffered by an expert who is sufficiently qualified by education, knowledge, training, and experience in the specific field of science. The expert must possess a demonstrated professional capability to assess the scientific significance of the underlying data and information, to apply the scientific methodology, and to explain the bases for the opinion reached.<sup>128</sup>

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119. *Id.* at 301.

120. *Id.* at 311-12.

121. 593 A.2d 733 (N.J. 1991).

122. *See id.* at 744-47.

123. *Id.* at 747.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.* at 747-48.

128. *Id.* The court reiterated this holding in *Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1084 (N.J. 1992).

We can see from these representative tort cases that the court follows a principled course in deciding issues. It endeavors to identify and explain the basic legal rules that govern or should govern the determination and outcome of the case. Understanding the importance of continuity, stability and consistency, and of accommodating reasonable expectations, the court will examine precedent and existing law and attempt to ascertain whether established authority may satisfactorily be applied in resolving the case; or whether there is a need—a decisional imperative—to depart from that authority and apply controversial but recognized principles, or even considerations of public policy, as opposed to rules of law accepted as settled authority. Ultimately, in the most difficult matters, the court may be required to consider public policy, social values and morality.

#### IV. JUDGING SOCIAL POLICY

In the tort cases that have been mentioned, the court recognized that accepted tort rules and principles, as conventionally understood and applied, would not yield a just result. It responded to that decisional imperative by directly invoking considerations of public policy in reaching its determinations. Those, and other cases, illustrate the process for a court's judicial incorporation of public policy as a basis for its decision.

In *Kelly v. Guinnell*,<sup>129</sup> the court stressed the public policy against drunk driving.<sup>130</sup> It stated:

In a society where thousands of deaths are caused each year by drunken drivers, where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened to the point where the Governor notes [in his Annual Message to the Legislature] that they are regarded as the toughest in the nation, the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy. Unlike those cases in which the definition of desirable policy is the subject of intense controversy, here the imposition of a duty is both consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society.<sup>131</sup>

In *Alloway v. Bradlees, Inc.*,<sup>132</sup> the court again dealt with work-site torts.<sup>133</sup> The court acknowledged, as it had in *Carvalho v. Toll*

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129. 476 A.2d 1219 (N.J. 1984).

130. *Id.* at 1222.

131. *Id.* (citation and footnote omitted).

132. 723 A.2d 960 (N.J. 1999).

133. *Id.* at 962.

*Bros. & Developers*,<sup>134</sup> the preexisting rule that general contractors ordinarily were not liable for injuries to subcontractors' employees, and that such liability should be governed by "general negligence principles."<sup>135</sup> It again recognized that there were unique circumstances defining the relationships among the parties that clearly influenced the determination of a proper result.<sup>136</sup> Consistent with the understanding that a policy decision is "legislative" in character and that public policy is primarily the responsibility of the legislature, the court examined important public policy considerations and the underlying dilemmas that gave rise to these claims.<sup>137</sup> It ruled that in defining the duty of care owed by a general contractor, the court and the jury could consider federal OSHA regulations in determining the nature and extent of a duty of care.<sup>138</sup>

In *Perez v. Wyeth Laboratories Inc.*,<sup>139</sup> which involved the direct-to-consumer advertising of medical products, the court acknowledged the decisional imperative that required a comprehensive consideration of public policy as grounds for its decision.<sup>140</sup> In explaining those public policy grounds, it took into account the New Jersey Products Liability Act, particularly, its provisions governing product warning.<sup>141</sup> The court reasoned nonetheless that even with the statutory backdrop, "[p]roducts liability law is based on concepts of fairness, feasibility, practicability and functional responsibility. We have always stressed the public's interest in motivating individuals and commercial entities to invest in safety to protect [consumers]."<sup>142</sup>

In the criminal law, the court has similarly recognized that it is not possible always to apply settled authority to reach correct results, and that when it is not just or feasible to do so, it must necessarily consult public policy. In *State v. Kelly*,<sup>143</sup> the court explored, as a basis for self defense, the battered-woman's syndrome, a psychological condition that, in the view of some experts, afflicts many physically-

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134. 675 A.2d 209 (N.J. 1996).

135. *Alloway*, 723 A.2d at 964-65.

136. *See id.* at 965-66.

137. *See id.* at 967.

138. *Id.* at 967-69. The court recounted statutory history to show that OSHA was the operative regulatory scheme, that the federal law had superseded the state's own regulatory scheme, the Construction Safety Act, and that such legislative and regulatory sources were material in determining the nature of the duty owed by a general contractor to the employees of a subcontractor. *Id.*

139. 734 A.2d 1245 (N.J. 1999).

140. *Id.* at 1254.

141. *Id.* at 1253-54.

142. *Id.* at 1262 (quoting *Zaza v. Marquess & Nell, Inc.*, 675 A.2d. 620, 636 (N.J. 1996)).

143. 478 A.2d 364 (N.J. 1984).

abused women.<sup>144</sup> Because the defendant testified that she had a justification for killing her husband (that her action was prompted by a belief in its necessity), the testimony sought to establish that her contention was credible and reasonable, despite the fact that she had chosen to stay with her husband after suffering physical attacks.<sup>145</sup> The court addressed fully the policy considerations in recognizing the relevance of the battered woman's syndrome as a defense to criminal charges; it decided that the expert testimony would be admissible as probative to the substantive defense of self-defense based on the reasonableness of the defendant's belief that she was in imminent danger.<sup>146</sup>

Other cases also illustrate that courts recognize and respond to the decisional imperative, and invoke considerations of public policy in determining difficult legal issues and confronting their underlying social dilemmas. Those concerns related to the after-effects of abandoned landfills in *Strawn v. Canuso*.<sup>147</sup> The court observed that: "We know that the physical effects of abandoned dump sites are not limited to the confines of the dump. . . . [O]ur precedent and policy offer reliable evidence that the value of property may be materially affected by adjacent or nearby landfills."<sup>148</sup> The court held:

[A] builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentation, but is also liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.<sup>149</sup>

It believed that the existence of an abandoned landfill was a material consideration that triggered the duty of disclosure even though established law did not recognize such a duty.<sup>150</sup>

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144. *Id.* at 369-75.

145. *Id.* at 375-77.

146. *See id.* at 378. The court believed that such evidence was necessary to overcome "the myths about battered women." *Id.* at 377. In spite of the fact that judicial opinions thus far had been divided concerning the scientific acceptability of the syndrome and the methodology used by researchers in this area, the court admitted the evidence based on proffered opinion by a professor of psychology stating that the battered-woman's syndrome is acknowledged and accepted by practitioners in both psychology and psychiatry. In doing so, the court implied that the discussion of the syndrome in scholarly publications and at professional gatherings lent support to its growing, if not general, acceptance in the field. *Id.* at 380-81.

147. 657 A.2d 420 (N.J. 1995).

148. *Id.* at 430.

149. *Id.* at 431 (footnote omitted).

150. *See id.*

In the employment field, the court, in *Woolley v. Hoffman-La Roche, Inc.*,<sup>151</sup> found existing legal rules and principles inadequate to address the claims arising from the discharge of an at-will employee under circumstances strongly indicating the unfairness and injustice of the discharge.<sup>152</sup> The court, focusing on the procedural fairness of such a discharge, held that where an employer has adopted an employment manual that purports to provide employees with procedural protections, such as notice and the opportunity to be heard, the provisions of that manual are binding on the employer and the employer must adhere to those procedures in determining whether even an at-will employee may be discharged.<sup>153</sup>

The court, in a later case, *Pierce v. Ortho Pharmaceutical Corp.*,<sup>154</sup> determined that common law rules that enabled employers to fire at-will employees without cause did not adequately address the policy concerns when that action implicated such concerns beyond the employment itself.<sup>155</sup> In effect, the court confronted the dilemma between employers' rights in choosing "the best personnel for the job" and running "their businesses as they see fit as long as their conduct is consistent with public policy."<sup>156</sup> It ruled, on substantive grounds, that an employer could not fire an at-will employee if the discharge constituted a retaliatory response based on the employee's criticism of the employers' acts that were reasonably perceived by the employee to be violations of law or a clear mandate of public policy.<sup>157</sup> "[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."<sup>158</sup>

There are other cases that have squarely presented fundamental legal issues and social dilemmas that could not be adequately resolved by the application of existing established legal authority. Some of these cases directly and inescapably implicated public policy and required the court to explore such sources for authoritative grounds of decision.

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151. 491 A.2d 1257 (N.J. 1985).

152. See *id.* at 1266.

153. See *id.* at 1267.

154. 417 A.2d 505 (N.J. 1980).

155. See *id.* at 511.

156. *Id.* at 510-11.

157. *Id.* at 512. The court indicated that "[t]he sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." *Id.*; cf. *D'Agostino v. Johnson & Johnson, Inc.*, 559 A.2d 420, 423 (N.J. 1989) (distinguishing *Pierce* and noting that public interest factors may not be relevant to *forum non conveniens* issues).

158. *Pierce*, 417 A.2d at 512.

In *In re Guardianship of J.C.*,<sup>159</sup> the court was asked to terminate a mother's parental rights so that her children could be adopted by foster parents or by another family on grounds of abandonment or threatened injury to the children.<sup>160</sup> The court recognized that "[t]he law . . . reflects a strong societal bent in favor of the integrity of the natural family."<sup>161</sup> The statutory criteria were not clearly expressed. The implicit standard was, like a "principle," ambiguous and controversial even though it was widely recognized.<sup>162</sup> Consequently, the court invoked competing considerations of public policy, the constitutional protection of parental rights juxtaposed against the "best interest[s] of the child."<sup>163</sup> The court considered and weighed differing psychological theories, espousing the psychological resiliency of children versus psychological bonding, both of which focus on the nature of the harm caused by the child's separation from foster parents.<sup>164</sup> The court held that if the state could prove by clear and convincing evidence that separating a child from his or her foster parents would cause serious and enduring emotional or psychological harm, then parental rights may be terminated and the child freed for adoption.<sup>165</sup>

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The cases involving controversies that pose complex legal issues stemming from major social dilemmas implicate concerns that touch on the collective interests of society. The decisions in these cases recognize the need to reach correct and just results and, to that end, these decisions demonstrate the principled judicial application of legal authority. The quest for sound sources of authority is a progression from legal rules and principles, and beyond those precepts to considerations of policy and social values. Further, the court's decisions in these cases confirm the judicial understanding that even though the courts have a necessary and active role, other branches of government have hegemony over policy. Thus, the process through which courts render policy decisions invariably brings them into the realm of public and social policy that is dominated by the other branches of government. In this inevitable interface between the judiciary and the other branches of government, courts must allow the other branches full opportunity—subject only to constitutional constraints—to address the underlying social issues and act on the same subject matter when these implicate public policy.

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159. 608 A.2d 1312 (N.J. 1992).

160. *Id.* at 1313.

161. *Id.* at 1315.

162. *Id.* at 1322.

163. *Id.* at 1318.

164. *Id.* at 1320-23.

165. *Id.* at 1320.

## V. SHARING SOCIAL POLICY

When the court recognizes a decisional imperative that impels it to posit a decision on considerations of public policy, it must acknowledge that its policy decisions, though binding on the parties, cannot definitively settle or resolve the underlying social dilemmas. The court in rendering such decisions necessarily shares with the legislature the grounds of public policy. We should therefore look more closely at how the joint occupation of that territory plays out.

In *Knight v. City of Margate*,<sup>166</sup> the court explained government interrelationships by pointing out that which is not often emphasized, namely, the capacity and the need to accommodate other branches of government when to do so will not violate constitutional limits or seriously offend the judiciary's own prerogatives: the basis for cooperation among the branches.<sup>167</sup> Thus, in the dynamic of law-making, judicial decisions influence legislative action and, in turn, legislative action influences and guides, if it does not always fully control, judicial action.

The constitutional rules that govern the interaction of the governmental branches of government are subsumed under the separation-of-powers doctrine.<sup>168</sup> This doctrine is usually formulated, almost as a set of Marquis de Queensbury rules, to assume that each branch of government will be able to exercise only its own distinctive constitutional powers without interference or inhibition from the other branches and to assure a fair fight when the branches are in conflict over the exercise of their respective constitutional powers.<sup>169</sup> Our court, understanding that the branches are constantly vying in the exercise of governmental authority, pushing and shoving against one another when they find themselves together in the public policy ring, has attempted to identify a more resilient essence of the separation-of-powers doctrine, one that has stressed the principles of accommodation that must be applied if the constitutional scheme of shared governmental powers is to succeed and government is to function effectively in the public interest. Separation-of-powers conflicts invariably and inevitably involve important matters of public policy and broad social issues, which, as noted, are inherently legislative in character and, when used by courts, invoke only discretion and cannot be determined by controlling legal authority. The question to be addressed, however, is how responsibility for sharing social policy

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166. 431 A.2d 833 (N.J. 1981).

167. *Id.* at 843.

168. *Id.* at 840 ("The constitutional spirit inherent in the separation of governmental powers contemplates that each branch of government will exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch.").

169. *See id.*



should be managed.

*Kelly v. Gwinell*<sup>170</sup> illustrates the interaction between the branches in matters of public policy. The court observed initially that it did "not agree that the issue addressed in this case is appropriate *only* for legislative resolution,"<sup>171</sup> and that its decision "is well within the competence of the judiciary" on policy grounds<sup>172</sup> because "the policy considerations served by [the] imposition [of a duty] outweigh those asserted in opposition."<sup>173</sup> It held that "a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by intoxication."<sup>174</sup> Social hosts have a duty to exercise reasonable care not to allow their guests to become visibly intoxicated when this poses the foreseeable risk of injury to others based on the danger of their driving while impaired.<sup>175</sup> Thereafter, the legislature undertook to address the social issues implicated in the court's ruling by enacting a statute that effectively codified the court's holding.<sup>176</sup>

The court's decision in *State v. Kelly*<sup>177</sup> comprehensively analyzed the social policy considerations implicated by the battered-woman's syndrome.<sup>178</sup> It went to great lengths to explain the necessity for considering those different policy concerns.<sup>179</sup> Exemplifying the

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170. 476 A.2d 1219 (N.J. 1984).

171. *Id.* at 1226 (emphasis added).

172. *Id.* at 1228.

173. *Id.* at 1224.

174. *Id.*

175. *Id.*

176. See N.J. STAT. ANN. § 2A:15-56 (West 1987).

177. 478 A.2d 364 (N.J. 1984).

178. *Id.* at 372.

179. The court explained:

The crucial issue of fact on which this expert's testimony would bear is why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent. Whether raised by the prosecutor as a factual issue or not, our own common knowledge tells us that most of us, including the ordinary juror, would ask himself or herself just such a question. And our knowledge is bolstered by the experts' knowledge, for the experts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave. . . . The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings . . . .

....  
... [The testimony] is aimed at an area where . . . jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge. . . .

shared nature of public policy, this judicial analysis became part of the matrix that constitutes our current comprehensive laws, both statutory and judicial, dealing with domestic violence.<sup>180</sup>

The court in *Perez v. Wyeth Laboratories, Inc.*<sup>181</sup> considered social dilemmas posed by the mass advertising of medical products in a setting in which it could be anticipated that the consumer would confer with a doctor before using the product; and it ruled on policy grounds that such manufacturers were subject to a qualified duty to assure adequate warning.<sup>182</sup> The court fully understood that its policy assessment must be consistent with the paramount legislative expressions; it acknowledged that the ultimate responsibility for dealing with this kind of issue was that of other governmental institutions—the legislature and regulatory agencies.<sup>183</sup> Nevertheless, the court stated it had a decisional responsibility to decide the case as best it could.<sup>184</sup>

Following *Strawn v. Canuso*,<sup>185</sup> in which the court determined that existing legal authority was inadequate to deal with the claims of a buyers who learned after buying a residence that there was a nearby off-site abandoned landfill that had not been revealed by the builder-developer, the court weighed competing legal principles and considerations of public policy, clarifying the underlying legal issue.<sup>186</sup> It recognized under the circumstances, the fairness of imposing a conditional duty of disclosure.<sup>187</sup> Thereafter, the legislature enacted a comprehensive statute codifying that duty of care, but in light of reasonable expectations, it made this new statutory duty prospective only.<sup>188</sup>

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....  
... Either the jury accepts or rejects that explanation and, based on that, credits defendant's stories about the beatings she suffered.

*Id.* at 377-78.

180. See, e.g., Prevention of Domestic Violence Act, N.J. STAT. ANN. § 2C:25-17 to -34 (West 2000) (providing expanded protection for victims of domestic violence through criminal laws and civil remedies); N.J. STAT. ANN. § 30:1-1.1 (West 2000) (outlining comprehensive social service information about hot-lines and existing services); Shelters for Victims of Domestic Violence Act, N.J. STAT. ANN. § 30:14-1 to -14 (West 2000) (providing shelter for victims of domestic violence); N.J. CT. R. 5:7A (authorizing restraining orders for domestic violence victims).

181. 734 A.2d 1245 (N.J. 1999).

182. *Id.* at 1264.

183. *Id.*

184. See *id.*

185. 657 A.2d 420 (N.J. 1995).

186. *Id.* at 431.

187. *Id.* at 431-32.

188. See New Residential Construction Off-Site Conditions Disclosure Act, N.J. STAT. ANN. § 46:3C-3 (West 2000).

Again, illustrating the interactive relationship among the governmental branches in terms of public policy, the legislature responded to *Pierce v. Ortho Pharmaceutical Corp.*<sup>189</sup> by enacting New Jersey's Conscientious Employee Protection Act.<sup>190</sup> This statute, referred to as CEPA, in effect, codified the *Pierce* holding authorizing an employee to claim wrongful discharge if the employee could demonstrate that he or she was fired for complaining about activities that are "incompatible" with or a violation of a "clear mandate of public policy."<sup>191</sup>

The adoption field is one that is heavily fraught with judicial and legislative interaction. In *In re K.H.O.*,<sup>192</sup> the court, again, dealt with the termination of parental rights, as it had in *In re J.C.*<sup>193</sup> In these adoption cases, the court was impelled to consider public policy both in defining the issues to be resolved and in explaining its grounds for decision. In *K.H.O.*, the court was asked to consider the status of a child who had been born addicted to drugs through the mother's drug use during pregnancy; the mother had been so severely addicted that she had never, during the child's five years of life, been in a position to care for the child.<sup>194</sup> The court, venturing into public policy and social values, and drawing on extensive statutory and regulatory background, held that a mother's drug use during pregnancy resulting in the birth of a drug-addicted child is a harm to the child, particularly when that is coupled with the continuing inability of the parent to care for her child.<sup>195</sup> The court informed by considerations of public policy and the legislative statutory expressions of that policy determined that the best interests of the child required the termination of parental rights.<sup>196</sup>

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189. 417 A.2d 505 (N.J. 1980).

190. N.J. STAT. ANN. § 34:19-1 to -8 (West 2000).

191. *Id.* § 34:19-3(c)(3). The *Pierce* decision and the CEPA were applied in other cases. *See, e.g.,* *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1001 (N.J. 1998) (ruling that public policy applied where employee alleged he was discharged in retaliation for objecting to excessive levels of benzene in gasoline produced by defendant's overseas subsidiary); *Abbamont v. Piscataway Township Bd. of Educ.*, 650 A.2d 958, 968 (N.J. 1994) (holding that local board of education may be vicariously liable as a public employer for the actions of its principal and superintendent in not rehiring tenured plaintiff who made health and safety complaints about the school); *D'Agostino v. Johnson & Johnson, Inc.*, 559 A.2d 420, 423 (N.J. 1989) (applying public policy where employee brought suit because he was terminated for allegedly refusing to approve foreign bribe payments and was subjected to defamatory statements by employer and employer conspired to prevent employee from obtaining other employment).

192. 736 A.2d 1246 (N.J. 1999).

193. 608 A.2d 1312 (N.J. 1992).

194. *In re K.H.O.*, 736 A.2d at 1249-50.

195. *Id.* at 1252-53.

196. *Id.* at 1260. The court based its conclusion in large part on a clear public policy favoring permanency. That policy was first articulated by the legislature in 1977 with

## VI. CONCLUSION

Law is very real and consequential. It expresses public authority and governs society. Law controls, regulates and directs the lives of its citizens. The law, therefore, must accommodate, even as it may influence and modify, reasonable expectations; and for that reason, while exhibiting flexibility in order to achieve correct and just results in the given case, the law must exhibit consistency, continuity and stability. These considerations serve to identify and, in some measure, explain the prioritization of legal authority that animates judicial decisions.

A court should proceed to decisions on the basis of accepted and acceptable authority that reflects social consensus and agreement; law accommodating those considerations can most readily bind society by anticipating reasonable expectations. That law is best expressed through settled legal rules, and accepted, albeit, controversial, legal principles.

There has to be a sound and compelling reason—a decisional imperative—for a court to abandon existing authority and extend the law to grounds beyond established legal rules and principles, grounds such as public policy, social values, and morality. That decisional imperative arises when the case presents, directly and inescapably, issues arising from difficult social dilemmas, the determination of which requires the application of public policy. When those social dilemmas and policy issues are present, the court is justified, indeed, required, to resort to policy grounds in its determination. When the court does so, however, it must understand that it may not be capable of definitively resolving such questions, and may, in such circumstances, reasonably resort to a construct such as conscious indeterminacy in expressing the result of its decision.

A court cannot fashion specific and definitive answers to such issues. It may, however, take a principled approach in finding answers that will clarify and refine the issues and advance their solutions and lead to their ultimate resolution, if not by the courts, then by others. Dworkin essayed an explanation of this process in emphasizing the "integrity" of the law, which can be related to the "coherence," consistency and stability of the law.<sup>197</sup> He compared a judge with a coauthor of a "chain novel" produced by many persons,

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the Child Placement Review Act, N.J. STAT. ANN. § 30:4c-50 (West 1997). That act was implemented by the court in *New Jersey Division of Youth & Family Services v. A.W.*, 512 A.2d 438 (N.J. 1986), a decision that was itself codified by the legislature. The court also noted the permanency movement that was recognized at the federal level reflected in the Adoption and Safe Families Act of 1997, N.J. STAT. ANN. § 9:3-37, the provisions of which were adopted by the New Jersey Legislature in April 1999.

197. RONALD DWORKIN, *LAW'S EMPIRE* 45 (1986).

each of whom conforms and adds to the growing narrative.<sup>198</sup> Similarly, each judge participates in the accretion of the law, adapting legal interpretations to already established principles and to the institutional history of the law, as well as to expectations concerning the future development of the law.

A court thus approaching its decisional responsibility can and will do much to advance the solutions of controversial and profound issues of policy, to clarify and refine intractable dilemmas that beset society and give rise to these issues; judicial decisions that in this way only partially solve such issues can, nevertheless, advance their solutions by explaining and reducing the dilemmas, even if those decisions cannot fully resolve them.

Sound elements of jurisprudence should be reflected in judicial decisions. Continuity and consistency remain important, and law, therefore, should conform to and fulfill reasonable expectations, doing so by resort to accepted rules of law and legal principles. The principle of "articulate consistency" may be important and necessary in achieving stability of the law. Tenets of legal philosophy may be found as cases advance through more complex issues of public policy. In the very difficult cases, spawned by the most daunting social dilemmas at the outer edges of public policy, courts will confront a decisional imperative that will impel them to resort to policy, social values and moral precepts. Nevertheless, those decisions will inevitably attempt to deal with the "inherent contradictions," that forever remain in the law, reflecting the tensions at the core of these dilemmas. Such decisions should, therefore, recognize and explain the inevitability of some degree of "conscious indeterminacy." In sum, judicial decisions in cases engendered by perplexing and profound social dilemmas should strive to clarify and explain those dilemmas and the complex legal issues they pose, even though they may not resolve them for all time.

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198. *Id.*